

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RALPHEL VACCARO,

Defendant-Appellant.

UNPUBLISHED  
September 4, 2003

No. 239369  
Calhoun Circuit Court  
LC No. 01-2602 FC

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Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520(b), following a jury trial and his sentence of twelve to thirty years' imprisonment. We affirm.

I. Facts and Proceedings

Defendant's conviction arises out of allegations that he digitally penetrated his youngest daughter three or four times each week beginning when she was "around" fourteen years old and continuing until April 2001 when she was fifteen years old. Defendant's oldest daughter, who was nineteen at the time of trial, also alleged that defendant had digitally penetrated her "any chance he got," beginning when she was fifteen years old and continuing until shortly before her seventeenth birthday. Although the prosecution filed a separate information concerning each complainant's allegations, the two charges of CSC I were consolidated for trial with the agreement of defendant's trial counsel.

At trial, defendant's wife, Peggy Vaccaro, testified that on one occasion, she walked into the living room of the family home and saw their youngest daughter lying on the floor next to defendant's chair and saw defendant's hand inside their youngest daughter's shorts. Peggy sent their youngest daughter to her room and confronted defendant concerning his behavior, telling him that she would leave with the children if he ever engaged in that behavior again. Defendant, however, grabbed a gun, pointed it in his mouth, and threatened to commit suicide. Because Peggy was afraid that defendant would hurt her or one of their children and did not want to break up the family, Peggy did not report the incident. She did not recall precisely when the incident occurred, but recalled that it happened before they made their oldest daughter move out of the home.

Defendant's oldest daughter testified that on February 21, 2000, when she was seventeen years old, defendant and her mother forced her to move out of their home because defendant did not approve of her boyfriend or the fact that she was sexually active. However, defendant's oldest daughter further testified that before she was forced to leave home, defendant frequently forced her to undress, touched her breasts, and digitally penetrated her while forcing her to touch his penis. She stated that she did not disclose the sexual abuse to anyone because defendant threatened to beat her if she did. Additionally, she testified that on one occasion, she walked into the living room and saw defendant with his "hand down [his youngest daughter's] pants."

Defendant's youngest daughter testified that beginning when she was approximately fourteen years old, defendant digitally penetrated her and touched her breasts three to four times each week. She stated that after the incident that her mother witnessed, the sexual assaults stopped for a short period of time, but later resumed. According to defendant's youngest daughter, defendant told her that if she told anyone what he was doing to her, he would go to prison and would "use that against her." Eventually, however, in April 2001, she disclosed the abuse to a school counselor and was consequently removed from the home by Child Protective Services.

Defendant presented the testimony of three witnesses. Eric Manthei, a neighborhood resident, testified that prior to defendant's arrest, he occasionally saw a car belonging to a man named James parked outside of the Vaccaro home and saw James exit the home. Carl Pickett, one of defendant's former co-workers, testified that defendant's daughters occasionally visited defendant at their workplace and that he did not notice anything unusual about their relationship. William Craig, defendant's friend, testified that Peggy Vaccaro was romantically involved with another man. He also testified that defendant's interaction with his daughters appeared normal.

Following deliberations, the jury returned a verdict of guilty of CSC I on count one, concerning the youngest complainant, and not guilty on count two.

At sentencing, the trial court exceeded the statutory sentencing guidelines range of fifty-one to 106 months' imprisonment<sup>1</sup> and imposed a sentence of twelve to thirty years' imprisonment. Although defense counsel asserted that the guidelines range accounted for all of the facts and circumstances in this case, the trial court disagreed. The trial court stated that "the long, repeated and clearly intentional course of predatory conduct in this case" was not sufficiently incorporated into the sentencing guidelines, and that exceeding the guidelines range was "more than adequately justified."

This appeal followed.

## II. Standards of Review

This Court's review of defendant's claims of ineffective assistance of counsel is limited to mistakes apparent on the record because defendant did not move for a new trial or a *Ginther*<sup>2</sup>

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<sup>1</sup> Defendant was sentenced as a second habitual offender.

<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

hearing. *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). Our review of defendant's unpreserved claim that permitting jurors to propound questions to witnesses deprived him of due process is limited to determining whether a plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). We review for abuse of discretion the trial court's determination that an aspect of the defendant's case constituted a substantial and compelling reason to exceed the statutory sentencing guidelines range. *People v Babcock*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 121310, decided 7/31/2003), slip op at 18 (*Babcock III*), quoting *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000) (*Babcock I*). In this context, an abuse of discretion exists when the trial court chooses an outcome outside of the principled range of outcomes. *Babcock III*, *supra* at 23.

### III. Analysis

Defendant first asserts two instances of ineffective assistance of counsel. To demonstrate ineffective assistance of counsel, defendant must show that his attorney's performance was deficient and that he suffered prejudice as a result of his attorney's deficient performance. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant claims that his trial counsel was ineffective by failing to object to joinder of the charges against defendant, asserting that knowledge of the fact that he was charged with multiple counts improperly influenced the jury to convict him of at least one charge. Defendant emphasizes that his defense focused on the witnesses' lack of credibility and contends that his trial counsel's actions deprived him of a fair trial. We disagree. In pertinent part, MCR 6.120(C) provides that

[o]n the motion of either party, . . . the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.

Although a trial court may try related offenses separately, it is not required to do so. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Accordingly, even if defense counsel had not agreed to join the charges, the trial court could have properly exercised its discretion to join the charges if the prosecution had moved for joinder. See *id.* Here, separate trials would have required duplicate testimony by the complainants' mother, the investigating detective, and defendant's witnesses. Likewise, each complainant could have testified in each trial. See *id.* Moreover, the potential for prejudice resulting from joinder was minimal, considering that only two charges were joined and the evidence was not complex. See MCR 6.120(C). Because joinder of the charges would not have constituted an abuse of the trial court's discretion, defendant's trial counsel's decision does not constitute ineffective assistance.

Moreover, defendant has failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different if the charges had not been joined. In its instructions to the jury, the trial court stated that "the fact that the Defendant is charged in this

case with two separate crimes, has been arrested[,] and is here on trial” is not evidence against defendant. Additionally, before dismissing the jury to begin its deliberations, the trial court stated:

One final caution. Remember that these are separate charges. Count 1 and Count 2 are separate offenses. The People and the Defendant are entitled to separate and independent deliberations and verdicts in each count. Your verdict reached with respect to one of the counts does not in any way relieve you of the obligation of independently deliberating and reaching an independent verdict as to the other.

Because the jury is presumed to follow the trial court’s instructions, *People v Lueth*, 253 Mich App 670, 687; 660 NW2d 322 (2002), the nature of the jury’s verdict does not indicate that the joint trial prejudiced defendant.

Next, defendant argues that his trial counsel rendered ineffective assistance by failing to object to a portion of Detective Timothy Hurtt’s testimony. We disagree. During direct examination of Detective Hurtt, the investigating detective from the Battle Creek Police Department, the following exchanges took place:

Q. During the period of time that you were conducting th[e] interview [with the youngest complainant]—and can you give us any idea of how many interviews you would have conducted over a 17-year career?

A. I couldn’t begin to tell you.

Q. Okay.

\* \* \*

A. It would be hundreds, hundreds of interviews.

Q. All right. Did you ever get the impression during the course of this interview with [the youngest complainant] that, uh, that something just didn’t feel right or didn’t seem right about what she was telling you?

A. No, I didn’t get any—normally you will get flags when you talk to people and they’ll tell you things. Just after investigating cases over the years, you’ll get a feeling, you’ll get a flag if something just is not right. I did not get that with [the youngest complainant].

\* \* \*

Q. Again, during the course of conversation with [the oldest complainant], . . . did you get any impressions or feelings that things that were being told to you, uh, just didn’t appear right, having—you know, given your conversation with [the youngest complainant]?

A. No, I—I did not get any flags.

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Q. Okay. Did—during the conversation with Peggy Vaccaro, did she seem to have any difficulties, um, telling you what she knew or what she had seen or anything about this you know, series of events?

A. No.

Q. Okay. Again, talking to Peggy Vaccaro, did you again get any impression that—that there was something about the details that she relayed to you that didn't fit within what [the complainants] had told you?

A. No.

Defendant argues that his trial attorney should have objected to this line of questioning because the prosecution elicited from Detective Hurtt his belief, based on seventeen years of experience, that defendant was guilty. Because determining the credibility of witnesses lies within the province of the jury, it is impermissible for one witness to be asked whether another witness is telling the truth. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Similarly, a witness may not offer an opinion concerning a criminal defendant's guilt or innocence. *Id.*

In the present case, although the assistant prosecutor did not ask Detective Hurtt whether he believed defendant was guilty, the assistant prosecutor indirectly asked Detective Hurtt whether the primary witnesses against defendant were credible. Under the circumstances of this case, questioning Detective Hurtt concerning witness credibility is tantamount to asking Detective Hurtt whether he believed that defendant was guilty. Accordingly, this line of questioning was inappropriate.

However, when asserting a claim of ineffective assistance of counsel, the defendant “must overcome a strong presumption that counsel's tactics constituted sound trial strategy.” *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2002), citing *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). “This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired.” *Rodgers*, *supra* at 715, citing *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Here, defendant has failed to show that his trial counsel's failure to object was not part of his trial strategy. “The failure to object is not a *per se* indicator of ineffective assistance of counsel because counsel may refuse to object for tactical reasons.” *State v Riffle*, 674 NE2d 1214, 1216 (Ohio App 1996), citing *State v Gumm*, 653 NE2d 253, 267 (Ohio 1995); see also *Rodgers*, *supra* at 718; *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984) (stating that defense counsel's failure to object to prosecutor's improper reference to facts not in evidence did not constitute ineffective assistance of counsel).

In his closing argument, defense counsel stated that

[h]uman beings are not polygraph machines. They're not lie detectors. No matter how much any police officer or detective wants to suggest to you that they're able to tell, they can't.

And that's why you never heard the question put to Detective Hurtt specifically, "Do you believe she was telling the truth?" Because that question would have been barely out of [the assistant prosecutor's] mouth, I would have objected[,] and it would have been sustained. That is opinion testimony[;] that is not permitted.

From these statements, it is clear that defense counsel recognized that questioning a witness concerning another witnesses' credibility is objectionable. Defense counsel may have refrained from objecting to Detective Hurtt's testimony because a favorable ruling on his objection would have deprived him of an opportunity to dispute the accuracy of Detective Hurtt's testimony during his closing argument. We cannot determine from the record before us that counsel's decision was not a matter of trial strategy. *Werner, supra* at 234.

Additionally, defendant has failed to show that he was prejudiced as a result of this alleged error. Defendant argues that in light of the credibility issues present in this case and the nature of the jury's verdict, his trial counsel's error likely affected the outcome of the trial. We disagree. Contrary to defendant's argument, we find that a conviction on the first count and an acquittal on the second count indicates that the jury did not give Detective Hurtt's testimony disproportionate weight. The jury found that defendant sexually assaulted only one complainant, yet Detective Hurtt stated that he did not sense "flags" during his interview with either complainant. Furthermore, the substance of Detective Hurtt's interviews with the complainants and Peggy Vaccaro was not introduced into evidence; thus, the jury did not know what specific information Detective Hurtt might have deemed credible, minimizing the impact of this testimony on the jury. Therefore, defendant's claims of ineffective assistance of counsel lack merit.

Next, defendant asserts that the trial court violated his due process right to an impartial jury by permitting the jurors to submit questions for witnesses during the trial.<sup>3</sup> We disagree. Defendant did not object to this practice in the trial court, so we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*. In *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972), our Supreme Court stated that "[t]he practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court." Defendant does not contend that the trial court abused its discretion in this particular case, but instead asserts that the practice of permitting jurors to propound questions is inappropriate because it encourages the jurors to seek facts and begin deliberating prior to the conclusion of the trial. See *State v Gilden*, 759 NE2d 468 (Ohio App, 2001), abrogated by *State v Fisher*, 789 NE2d 222 (Ohio, 2003).

Stare decisis prohibits us from reaching a conclusion in this case that is contrary to *Heard*. *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Furthermore,

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<sup>3</sup> During trial, the trial court permitted jurors to submit questions in writing at the conclusion of attorney questioning of each witness. The trial court indicated to the jurors that it would review each question for compliance with evidentiary rules before it asked the witness the question, and each attorney was permitted to ask follow-up questions.

because defendant has failed to demonstrate that a plain error occurred, defendant has forfeited review of this issue. *Carines, supra*.

Finally, defendant argues that the trial court impermissibly exceeded the legislative sentencing guidelines range applicable to this case. Specifically, defendant claims that the trial court failed to acknowledge that its reasons for departure are addressed by specific offense variables and failed to articulate how the weight given to each factor was inadequate. We disagree. MCL 769.34(3) provides, in pertinent part:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

\* \* \*

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

In support of his argument, defendant relies on *People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002). *Hornsby*, however, is distinguishable from the present case. In *Hornsby*,

the trial court failed to [acknowledge] the limitations on its ability to sentence defendant to a term that exceeds the guidelines range for the . . . offense or even that it intended to sentence defendant outside the guidelines range. Although the trial court included a written amendment to the sentencing guidelines form to the effect that it had found substantial and compelling reasons for the departure because of defendant's extensive prior criminal record and conviction of multiple charges arising from the instant offense, the court failed to articulate how defendant's prior and concurrent convictions, which already were taken into account under the guidelines scoring . . . received inadequate weight within the guidelines. [*Id.* at 474.]

In the present case, however, the trial court clearly recognized that its sentence was a departure from the guidelines. Additionally, the trial court concluded that "the long, repeated and clearly intentional course of predatory conduct," was not adequately incorporated into the guidelines, justifying departure from the guidelines. We find, therefore, that the trial court did not abuse its discretion in determining that the pattern of conduct engaged in by defendant constituted a substantial and compelling reason for departure from the guidelines range.

Affirmed.

/s/ Jane E. Markey  
/s/ Henry William Saad  
/s/ Kurtis T. Wilder